

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	File No. EB-03-NY-080
)	File No. EB-03-NY-081
)	
Kimtron, Inc.)	NAL/Acct. No. 200432380006
Stations WPTR(AM) and WDCD-FM)	
Blue Bell, Pennsylvania)	FRN No. 0003-4129-62

FORFEITURE ORDER

Adopted: February 8, 2005**Released: February 10, 2005**

By the Assistant Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of four thousand eight hundred dollars (\$4,800) to Kimtron, Inc. (“Kimtron”), licensee of AM Station WPTR, Albany, New York and Station WDCD-FM, Clifton Park, New York, for willful and repeated violation of Sections 11.35(a), 11.61(a)(1)(i), and 11.61(a)(2)(i)(A) of the Commission’s Rules (“Rules”).¹ The noted violations involve Kimtron’s failure to conduct required monthly and weekly tests of the Emergency Alert System (“EAS”) and failure to maintain station records of required monthly and weekly EAS test messages.

2. On January 13, 2004, the Commission’s New York, New York District Office (“New York Office”) issued a *Notice of Apparent Liability for Forfeiture* (“NAL”) to Kimtron for a forfeiture in the amount of six thousand dollars (\$6,000).² Kimtron filed a response to the NAL on February 11, 2004.

II. BACKGROUND

3. On June 4, 2003, a Commission agent conducted an inspection of the EAS equipment and records for Stations WPTR and WDCD-FM. The two radio stations, which serve different communities, were using the same EAS equipment. The agent found that over a six month period (December 2002 through May 2003), WPTR and WDCD-FM failed to conduct required weekly tests (“RWTs”) of the EAS header and EOM codes for 16 weeks: December 1, 2002 through January 11, 2003; January 19 - 25, 2003; February 9 - 15, 2003; February 23 through March 15, 2003; April 6 - 19, 2003; April 27 through May 3, 2003; and May 18 - 31, 2003. The agent also found that the stations failed to conduct required monthly tests (“RMTs”) of the EAS header codes, Attention Signal, Test Script, and End of Message (“EOM”) code for December, 2002, January, 2003 and March 2003.

4. In addition, the agent found that the stations failed to maintain EAS equipment so that it was capable of receiving weekly EAS test messages, failed to maintain station records of RWTs

¹ 47 C.F.R. §§ 11.35(a), 11.61(a)(1)(i), and 11.61(a)(2)(i)(A).

² *Notice of Apparent Liability for Forfeiture*, File No. EB-03-NY-080, EB-03-NY-081, NAL/Acct. No. 200432380006 (Enf. Bur., New York Office, released January 13, 2004).

received, or in the alternative, failed to enter into the log reasons why the tests were not received for 15 weeks: December 1, 2002 through January 25, 2003; February 23, 2003 through March 8, 2003; March 30, 2003 through April 5, 2003; April 13 - 19, 2003; April 27 through May 3, 2003; and, May 11- 24, 2003. The same problem existed for the RMTs received for December 2002, January 2003, and March 2003.

5. On January 13, 2004, the New York Office issued the subject *NAL* to Kimtron for six thousand dollars (\$6,000) for apparent willful and repeated violation of Sections 11.35(a), 11.61(a)(1)(i), and 11.61(a)(2)(i)(A) of the Rules for the referenced EAS violations between December 1, 2002 through May 31, 2003. Kimtron responded to the *NAL* stating that it determined, based on its own investigation, that its EAS equipment was fully functional and programmed to receive all monthly and weekly EAS tests supplied by the Local Primary Station, Station WMHT-FM. Kimtron alleges that Station WMHT-FM did not deliver its EAS obligation for RMTs during the months of December 2002, January 2003 and March 2003, Kimtron also states that its chief operator, who was charged with executing the RWTs and maintaining all EAS logs, failed to consistently perform his duties of executing or logging in the RWTs. Kimtron states that it has discharged that engineer and replaced him with a qualified individual. Kimtron maintains that it has a history of compliance with Commission Rules and requests that the proposed forfeiture be cancelled.

III. DISCUSSION

6. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended, (“Act”),³ Section 1.80 of the Rules,⁴ and *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) (“*Policy Statement*”). In examining Kimtron’s response, Section 503(b) of the Act requires that the Commission take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.⁵

7. Section 11.61(a)(1)(i) of Rules requires broadcast stations to conduct RMTs of the EAS header codes, Attention Signal, Test Script, and EOM code that conforms to procedures in the EAS Operating Handbook, and Section 11.61(a)(1)(v).⁶ WPTR and WDCD-FM’s station records failed to show that RMTs of the EAS header codes, Attention Signal, Test Script, and EOM code were received or transmitted for the months of December 2002, January 2003, and March 2003. Kimtron was monitoring Station WMHT-FM for its EAS obligation and claims that WMHT-FM did not send EAS monthly tests for those three months. Subsequent to the issuance of the *NAL*, the New York Office contacted WMHT-FM and, according to WMHT-FM’s records, it did transmit an EAS monthly test in December 2002 and January 2003, but not in March, 2003.⁷ In March of each year, the National Weather Service (“NWS”) normally sends the RMT for Region 6 of New York. In March of 2003, however, NWS did not send out a RMT due to adverse weather conditions. Because WMHT-FM did not transmit an EAS test for March, 2003 to WPTR and WDCD-FM, the stations could not conduct that EAS test. Based on evidence from WMHT-FM and the inspection, Kimtron failed to conduct RMTs in

³ 47 U.S.C. § 503(b).

⁴ 47 C.F.R. § 1.80.

⁵ 47 U.S.C. § 503(b)(2)(D).

⁶ 47 C.F.R. § 11.61(a)(1)(v).

⁷ The New York Office contacted the chief engineer for WMHT-FM who confirmed this information by correspondence dated November 19, 2004.

December, 2002 and January, 2003.

8. Section 11.61(a)(2)(i)(A) of the Rules requires broadcast stations to conduct required weekly tests of the EAS header and EOM codes at least once a week at random days and times. For the six month period between December 1, 2002 and May 31, 2003, WPTR and WDCD-FM's station records indicate that Kimtron failed to conduct the RWTs of the EAS header and EOM for the 16 weeks as listed above.⁸ When the Field Office contacted WMHT-FM to determine if WMHT-FM transmitted EAS tests for the weeks in question, WMHT-FM replied that for five random weeks during the six-month period in question, WMHT-FM did not transmit EAS tests due to clerical errors.⁹ Because WMHT-FM did not transmit EAS tests for those five weeks to WPTR and WDCD-FM, the stations could not conduct those EAS tests. Kimtron, however, does not dispute that EAS tests were not broadcast for any of the weeks in question, attributing the inconsistent treatment of RWTs to the chief engineer whom it subsequently discharged. Based on the evidence from WMHT-FM and the inspection, Kimtron failed to conduct RWTs for 11 weeks between December 1, 2002 and May 31, 2003.

9. Section 11.35(a) of the Rules requires broadcast stations to ensure that their EAS equipment is installed so that the monitoring and transmitting functions are available during times that stations and systems are in operation. Additionally, broadcast stations must determine the cause of any failure to receive the required monthly and weekly EAS tests and make entries in the station records indicating the reasons why any tests were not received. Kimtron failed to log RMTs received for the months of December, 2002 and January, 2003, failed to note that it did not receive a test for March, 2003, and failed to record a reason why the test was not conducted in March, 2003. Further, Kimtron made no log entries of RWTs sent for the 15 weeks between December 1, 2003 and May 24, 2003, as listed above,¹⁰ nor did it note that it did not receive or log reasons why it did not receive RWTs for the five weeks the tests were not sent from WMHT-FM.

10. We conclude that Kimtron willfully¹¹ and repeatedly¹² violated Sections 11.35(a), 11.61(a)(1)(i), and 11.61(a)(2)(i)(A) of the Rules. The Commission has consistently held that the licensee is responsible for its employees' actions, so Kimtron is liable for the actions of its chief engineer.¹³ Moreover, correction of the violations is expected and does not merit a reduction of the forfeiture amount.¹⁴

11. We have examined Kimtron's response to the *NAL* pursuant to the statutory factors

⁸ See para. 3, *supra*.

⁹ See note 7, *supra*.

¹⁰ See para. 4, *supra*.

¹¹ Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that "[t]he term 'willful,' ... means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act" *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

¹² As provided by 47 U.S.C. § 312(f)(2), "[t]he term 'repeated', when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day." The *Conference Report* for Section 312(f)(2) indicates that Congress intended to apply this definition to Section 503 of the Act as well as Section 312. See H.R. Rep. 97th Cong. 2d Sess. 51 (1982). *Southern California Broadcasting Co.*, *supra*.

¹³ *Eure Family Limited Partnership*, 17 FCC Rcd 21861, 21863-64 (2002).

¹⁴ *AT&T Wireless Services, Inc.*, 17 FCC Rcd 21866, 21871 (2002); *Seawest Yacht Brokers*, 9 FCC Rcd 6099 (1994).

above, and in conjunction with the *Policy Statement* as well. As a result of our review, we conclude that Kimtron willfully and repeatedly violated Sections 11.35(a), 11.61(a)(1)(i), and 11.61(a)(2)(i)(A) of the Rules, but we find that the forfeiture for these violations should be reduced to \$4,800 because of Kimtron's history of past compliance.¹⁵

IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Sections 0.111, 0.311 and 1.80(f)(4) of the Rules,¹⁶ Kimtron, Inc. **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of four thousand eight hundred dollars (\$4,800) for its willful and repeated violation of Sections 11.35(a), 11.61(a)(1)(i), and 11.61(a)(2)(i)(A) of the Rules.

13. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.¹⁷ Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. Payment by overnight mail may be sent to Bank One/LB 73482, 525 West Monroe, 8th Floor Mailroom, Chicago, IL 60661. Payment by wire transfer may be made to ABA Number 071000013, receiving bank Bank One, and account number 1165259. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.¹⁸

14. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class and Certified Mail Return Receipt Requested to Kimtron, Inc., P.O. Box 3003, Blue Bell, Pennsylvania 19422, and to its counsel, John S. Neely, Esquire, Miller and Nelly, P.C., 6900 Wisconsin Avenue, Suite 704, Bethesda, Maryland 20815.

FEDERAL COMMUNICATIONS COMMISSION

George R. Dillon
Assistant Chief, Enforcement Bureau

¹⁵ *KGB, Inc.*, 13 FCC Rcd 16396, 16398 ¶ 8 (1998).

¹⁶ 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

¹⁷ 47 U.S.C. § 504(a).

¹⁸ *See* 47 C.F.R. § 1.1914.